A.02-11-007
D.04-03-039

Commissioner Geoffrey F. Brown, Concurring:

I support Commissioner Lynch's alternate.

The utility claims that the water rights at issue were not necessary or useful in the performance of its duties to the public, citing *Pacific Gas & Electric Company* (D. 82-12-121) for the proposition that such property may be sold without Commission §851 authorization. It is true that the cited decision so holds.

The Lynch alternate admirably distinguishes this case on its facts, the details of which needn't be reiterated here. In sum, PG&E sold coal-producing property that it purchased with shareholder assets in anticipation of building a power plant nearby. The coal-producing property was no longer necessary or useful when the utility could no longer build the plant in the vicinity.

Those facts are wholly different from the facts adduced in this case. Here, a water company leased *in perpetuity* the water rights, purchased with ratepayer assets, without consulting the commission. Simply because the water rights here had no monetary amount attached when first acquire does not mean they have no value. Water rights are a water utility's stock and trade. Inventory, by its nature, is rarely completely fungible. Some components of it are always better than others. If a utility may cherry pick from its inventory and thereafter justify the disposition of a portion based on perceived irregularity, §851's purpose will be essentially undermined. By analogy, it would be as if a gas utility decided to sell without permission its gas in storage simply because it was not in use at the time.

A good faith purchaser or lessor of property is protected by §851 from having to relinquish such property rights notwithstanding the fact that a sale of necessary and useful rights without authorization is void, not voidable; this salient fact of the statute *alone* makes prior approval of disposition of assets by the commission especially important if ratepayers are to be protected against imprudent giveaways of the utility's assets. In this instance, absent evidence that the lease was not in good faith, the lessor's rights to SCWC's water obviously cannot be invalidated, a disconcerting situation that prior approval was designed to prevent.

One cannot help but conclude that SCWC decided to practice the old adage that it is easier to ask forgiveness than permission. It did so at its peril and its shareholders should not be rewarded for management's cavalier approach.

The Lynch alternate, in my opinion, does not go far enough. I would specifically overrule D. 82-12-121, to the extent that it can be read to permit a utility to sell without authorization pursuant to §851 property that, under any legitimate inference, might be deemed necessary or useful to the performance of its duties to the public henceforth. There is a real potential for accounting mischief, misappropriation, and conversion, with a concomitant resulting increase in utility rates that flows from an expansive reading of D. 82-12-121. As such, I would specifically disapprove its reasoning and preclude its citation in §851 cases in the future.

/s/ GEOFFREY F. BROWN
GEOFFREY F. BROWN
Commissioner

San Francisco, California
March 16, 2004